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(3)

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 10-227

JAMES D. SCHNELLER, Heirs and beneficiaries of MARJORIE SCHNELLER, JAMES D. SCHNELLER, trustee ad litem, Estate of MARJORIE SCHNELLER, JAMES D. SCHNELLER, trustee ad litem, MARJORIE ZITOMER, executrix of the Estate of MARJORIE SCHNELLER, Estate of GEORGE H. SCHNELLER, by and through personal representative JAMES D. SCHNELLER

Petitioner

v.

HERMAN McGILL, M.D.

Respondent

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE

I, George H. Knoell, III., certify that three true and correct copies of Response of Herman McGill, M.D. in Opposition to Petition for Writ of Certiorari filed by Petitioner, James D. Schneller, Heirs and beneficiaries of Marjorie Schneller, James D. Schneller, trustee ad litem, Estate of Majorie Schneller, James D. Schneller, trustee ad litem, Marjorie Zitomer, executrix of the Estate of Marjorie Schneller, Estate of George H. Schneller, by and through personal representative James D. Schneller were served on Plaintiff Pro Se via U.S. First Class Mail, postage prepaid on August 30, 2010, as follows:

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Certificate under Rule 33.1(h)

I, George H. Knoell, III., certify that the Response of Herman McGill, M.D. in Opposition to Petition for Writ of Certiorari filed by Petitioner, James D. Schneller, Heirs and Beneficiaries of Marjorie Schneller, James D. Schneller, trustee ad litem, Estate of Marjorie Schneller, James D. Schneller, trustee ad litem, Marjorie Zitomer, executrix of the Estate of Marjorie Schneller, Estate of George H. Schneller, by and through personal respresentative James D. Schneller complies with the word limitations. The Response in Opposition to Petition for Writ of Certiorari contains 3,085 words.

KANE, PUGH, KNOELL, TROY & KRAMER, LLP

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I. QUESTIONS PRESENTED

Has the Petitioner presented a compelling reason for the Court to grant Certiorari to review the Entry of Judgment of the United States Court of Appeals for the Third Circuit given that:

A. The factual record supports the finding of the United States Court of Appeals for the Third Circuit that the United States District Court of the Eastern District of Pennsylvania properly dismissed Petitioner's civil action based upon the Court's lack of subject matter jurisdiction; and,

B. The factual record supports the finding of the United States Court of Appeals for the Third Circuit that the United States District Court of the Eastern District of Pennsylvania properly dismissed Petitioner's civil action as untimely; and,

C. The Entry of Judgment of the United States Court of Appeals for the Third Circuit does not present an unsettled important question of law; and,

D. In the instant matter, the United States Court of Appeals for the Third Circuit has not decided an important

federal question that conflicts with relevant decisions of the United States Supreme Court.

II. TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	4
CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT	8
COUNTER-STATEMENT OF THE CASE	9
SUMMARY OF ARGUMENT	13
ARGUMENT	14
CONCLUSION	19

III. TABLE OF AUTHORITIES

CASES	PAGE
City of Rancho Palos Verdes v. Abrams, 606 F. Supp.100 (E.D. Pa. 1985)	12, 18
Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)	17
Gomez v. Toledo, 446 U.S. 635 (1980)	17
Groman v. Township of Manalapan, 47 F.3d (628) (3d Cir.1995)	16, 17
Lake v. Arnold, 232 F.3d 360, 368 (3d Cir.2000)	18
Menan Co. v. Alt. Mut. Ins. Co.,	

147 F.3d 287 (3d Cir.1998) 13

Oklahoma City v. Tuttle,
471 U.S. 808 (1985) 16

Schneller, et al. v. Crozer
Chester Medical Center, et al.,
No. 06-0698, 2006 U.S. Dist.
LEXIS 21053 (E.D. April 18,2006) 8-9

Schneller, et al. v. Crozer
Chester Medical Center, et al.,
276 Fed. Appx. 169 (3d Cir.2008) 9

Sodi v. Discover Financial
Services, 2004 U.S. Dist.
LEXIS 24133 (E.D.Pa.2004) 13

Strawbridge v. Curtiss,
7 U.S. (3 Cranch) 267, L. Ed. 435 13

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 14

CODES

28 U.S.C. § 1331 12, 13

28 U.S.C. § 1332 12, 13

42 U.S.C. § 1983 15, 16, 17, 18

42 U.S.C. § 1985 15, 18

42 U.S.C. § 1986 15, 18

42 U.S.C. § 14401, *et seq.* 14, 15

RULES

Rules of Supreme Court of U.S.

Rule 10 7, 12, 17

Pa.R.C.P. 1042.3 8

OTHER AUTHORITIES

U.S. Const. amend. XIV 15

IV. CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

In the Petition for Writ of Certiorari, the Petitioner fails to set forth a basis for jurisdiction in the United States Supreme Court. As stated in the Rules of the Supreme Court of the United States Rule 10, "a petition for a writ of certiorari will be granted only for compelling reasons."

In this case, the United States Court of Appeals for the Third Circuit affirmed the Judgment of the United States District Court of the Eastern District of Pennsylvania, which dismissed the Petitioner's civil action, based upon a lack of subject matter jurisdiction. The Judgment also dismissed the Petitioner's action as untimely. The Entry of Judgment of the United States Court of Appeals for the Third Circuit does not present an unsettled important question of law. Furthermore, the United States Court of Appeals for the Third Circuit has not decided an important federal question that conflicts with relevant decisions of the United States Supreme Court. Therefore, there is no basis for jurisdiction in this Court.

V. COUNTER-STATEMENT OF THE CASE

This matter derives from a civil action that was filed in the United States District Court for the Eastern District of Pennsylvania by the Petitioner, James D. Schneller, Heirs and beneficiaries of Marjorie Schneller, James D. Schneller, trustee ad litem, Estate of Marjorie Schneller, James D. Schneller, trustee ad litem, Marjorie Zitomer, executrix of the Estate of Marjorie Schneller, Estate of George H. Schneller, by and through personal representative James D. Schneller (hereinafter "Petitioner").

On February 12, 2006, Petitioner filed a Motion to Proceed In Forma Pauperis with regard to the underlying professional negligence action against numerous defendants, including Respondent Herman McGill, M.D. (hereinafter "Respondent") in connection with the deaths of his mother, Marjorie Schneller, and his father, George H. Schneller, on March 31, 2002 and October 30, 2001, respectively.[1] This matter was dismissed by the District Court based upon jurisdiction prior to the perfection of service. *See Schneller, et al. v.*

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[1] By way of background, in October of 2004, the plaintiff commenced a series of actions against these defendants in the Court of Common Pleas of the Counties of Delaware, Chester and Montgomery, alleging both medical and legal negligence in connection with the death of his parents. These cases were dismissed through entries of judgment *non pros* for failure to file Certificates of Merit as required by Rule 1042.3 of the Pennsylvania Rules of Civil Procedure. After exhausting all remedies, plaintiff received a denial of his petitions for writ of *certiorari* by the United States Supreme Court.

Crozer Chester Medical Center, et al., No. 06-0698, 2006 U.S. Dist. LEXIS 21053, *7-8 (E.D.Pa.April 18, 2006). On appeal, the United States Court of Appeals for the Third Circuit vacated the dismissal, holding that Petitioner should have been given an opportunity to amend his complaint. *Schneller, et al. v. Crozer Chester Medical Center, et al.*, 276 Fed. Appx. 169, *171 (3d Cir. 2008). Instead of filing an amended complaint, on March 27, 2008, Petitioner instituted a new, yet identical, lawsuit in the District Court.

In his Complaint, Petitioner set forth the following facts: (1) that George H. Schneller died on October 30, 2001; (2) that Marjorie Schneller died on March 31, 2002, after a stay in two nursing homes, as well as periods of treatment during a period of hospitalization from July of 2001 until her death; and (3) that Marjorie Zitomer is the sister of Petitioner and the executrix and administrator of the estate of Marjorie C. Schneller and co-administrator with Petitioner and Richard Schneller of the paternal estate. Based upon these allegations of facts, Petitioner's Complaint contained the following counts:

Count 1A	Violation of the Assisted Suicide Funding Restriction Act of 1997
Count 1B	Civil Action for Deprivation of Rights
Count 1C	Conspiracy to Interfere with Civil Rights – Depriving Persons of Rights and Privileges
Count 1D	Conspiracy to Interfere with Civil Rights – Obstructing Justice and Intimidating Parties – Battery

Count 1E	Neglect to Prevent Deprivation of Rights and Conspiracy for Deprivation of Rights – Failure to Warn
Count 2	Breach of Contract
Count 3	Breach of Contract
Count 4	Fraudulent Inducement of Contracts
Count 5	Breach of Confidential Relationship, Fiduciary Relationship and Fiduciary Duty
Count 6	Wrongful Death
Count 7	Survival
Count 8	Intentional Tort – Abuse of Power of Attorney
Count 9	Intentional Tort – Abuse of Advance Health Care Directive
Count 10	Negligence *Per Se*
Count 11	Battery
Count 12	Batter – Lack of Informed Consent
Count 13	Product Liability
Count 14	Survival – Negligent and Intentional Infliction of Emotional Distress
Count 15	Survival – Conspiracy
Count 16	Survival – Punitive Damages
Count 17	Professional Negligence – Medical
Count 18	Professional Negligence – Attorney
Count 19	Slander and Libel
Count 20	Fraud and Intentional Misrepresentation
Count 21	Conspiracy
Count 22	Negligent and Intentional Infliction of Emotional Distress
Count 23	Breach of Fiduciary Duty

Count 24	Tortious Interference with Present and Prospective Economic Advantage
Count 25	Punitive Damages

Petitioner identified Respondent as Marjorie Schneller's general physician, indicating that the action against Respondent was one of professional liability and intentional tort.

In response to the Complaint, Respondent filed a Motion for Joinder to the Motion to Dismiss of Defendants Crozer Keystone Health System and Crozer Chester Medical Center and Motion to Dismiss of Defendant Lalith Gurijala. On March 19, 2009, the District Court granted all pending Motions to Dismiss and sua sponte denied any remaining motions as moot. The District Court further directed that this case be marked as closed, as all claims had been dismissed as to all of the defendants. Petitioner then filed a Motion for Reconsideration with the District Court, which was denied on June 26, 2009. Subsequently, on July 27, 2009, Petitioner filed a Motion for Leave to Appeal In Formal Pauperis, which was granted on August 3, 2009.

Thereafter, on September 29, 2009, Petitioner filed an appeal to the Court of Appeals for the Third Circuit. On July 20, 2010, the Court of Appeals for the Third Circuit issued an Entry of Judgment that affirmed the Judgment of the District Court.

Petitioner now seeks Certiorari in this Honorable Court.

VI. SUMMARY OF THE ARGUMENT

The Court of Appeals for the Third Circuit properly affirmed the District Court's dismissal of the Petitioner's in its entirety for various reasons. First, the District Court lacked subject matter jurisdiction. Petitioner failed to establish the existence of a federal question, pursuant to 28 U.S.C. § 1331, or, in the alternative, diversity of citizenship among the parties and an amount in controversy in excess of $75,000, pursuant to 28 U.S.C. § 1332.

Second, the plaintiff's federal claims failed as untimely. To assert his claims, the plaintiff relied upon federal statutes that do not explicitly contain a provision regarding time limitations. Consequently, Pennsylvania's two year personal injury statute of limitations is applicable. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 (2005). Plaintiff is well beyond the applicable statutory period, as this cause of action arises out of his mother's death on March 31, 2002 and the events preceding that date.

Also, in the Petition for Writ of Certiorari, Petitioner fails to set forth a basis for jurisdiction in the United States Supreme Court. As stated in the Rules of the Supreme Court of the United States Rule 10, "a petition for a writ of certiorari will be granted only for compelling reasons." The Entry of Judgment of the United States Court of Appeals for the Third Circuit does not present an unsettled important question of law. Furthermore, the United States Court of Appeals for the Third Circuit has not decided an important federal question that

conflicts with relevant decisions of the United States Supreme Court. Therefore, there is no basis for jurisdiction in this Court.

VII. ARGUMENT

A. THE COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CAUSE OF ACTION BASED UPON A LACK OF SUBJECT MATTER JURISDICTION.

Federal Courts are granted subject matter jurisdiction over cases where there is complete diversity of citizenship among the parties and an amount in controversy in excess of $75,000. *28 U.S.C. § 1332(a).* Courts have interpreted this requirement of complete diversity to mean that "jurisdiction [in federal court] is lacking if any plaintiff and any defendant are citizens of the same state." *Menan Co. v. Alt. Mut. Ins. Co.*, 147 F.3d 287, 290 (3d Circ 1998) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, L.Ed. 435 (1806)). In the case at bar, Petitioner and the eleven named defendants are residents of the Commonwealth of Pennsylvania. It is, therefore, obvious that there is no diversity of citizenship amongst the parties, rendering 28 U.S.C. § 1332(a) inapplicable.

Moreover, Petitioner failed to present a sufficient federal question in accordance with 28 U.S.C. § 1331. Federal question jurisdiction exists in one of two circumstances: "(1) where federal law

creates the cause of action; or (2) the complaint poses a substantial federal question." *Sodi v. Discover Financial Services*, 2004 U.S. Dist. LEXIS 24133, *8 (E.D.Pa.2004).

Petitioner attempted to set forth a federal cause of action to the extent he alleged a violation of the Assisted Suicide Funding Restriction Act of 1997, 42 U.S.C. § 14401, *et seq.* However, this Act does not create a private right action, and, thus does support federal question jurisdiction.

To determine whether Congress intended to create a private cause of action under a federal statute, one should examine the language and circumstances surrounding its enactment. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). Whether a statute creates a particular cause of action, "either expressly or by implication, is basically a matter of statutory construction." *Id.* The Act at issue does not expressly provide for a private cause of action. Moreover, the Act explicitly states that the purpose of its enactment is "to continue current Federal policy by providing explicitly that Federal funds may not be used to pay for items and services (including assistance) the purpose of which is to cause (or assist in causing) the suicide, euthanasia, or mercy killing of any individual." *42 U.S.C. § 14401(b).*

Petitioner alleged that the defendants, including Respondent, are in violation of the Act to the extent they utilized government funds for the purpose of paying for health care services to assist in causing the death of his Marjorie Schenller by euthanasia, mercy killing and assisted suicide. Petitioner has misapplied the law, as the language of

the Act further indicates that its promulgation was based upon the intent of Congress to prevent federal funds and services from being used for the criminal and unlawful purpose of assisted suicide. *42 U.S.C. § 14401(a)(2).* In the case at bar, Petitioner has not filed any criminal charges in connection with the care and treatment of his parents. Not only is Petitioner misguided in his application of the Assisted Suicide Funding Restriction Act of 1997, 42 U.S.C. § 14401, *et seq.*, but also, and, more importantly, there is no private cause of action under this statute, either expressly, or by implication.

Petitioner also asserted civil claims against the defendants, including Respondent, under 42 U.S.C. §§ 1983, 1985 and 1986. Petitioner attempted to set forth civil rights claims against Respondent for violations of Marjorie Schneller's Fourteenth Amendment rights. Specifically, it was alleged that Respondent deprived Marjorie Schneller of life, liberty and property in their implementing of the advanced health care directive over Petitioner's objection, resulting in Mrs. Schneller's death. It was further contended that Respondent conspired to deprive Marjorie Schneller of rights and privileges, including "life, privacy, security, freedom of speech, freedom to write and communicate, right to locomotion, family interaction, rights to legal representation, to meaningful family visits and right to choose her daily regiment and health program." Petitioner alleged that Respondent also conspired for the purpose of "impeding, hindering, obstructing, and defeating, the due course of justice enjoyed by citizens, with the intent to deny plaintiffs the equal protection of the laws," and that these acts constituted causes of action for obstruction of

justice, criminal assault and criminal maiming. Lastly, it was alleged that Respondent neglected to prevent a deprivation of rights and conspiracy for deprivation of rights to the extent they had "knowledge of the wrongs conspired to be done, as enumerated in this complaint, were about to be committed, and having power to prevent or aid in preventing the commission of same..."

The language of 42 U.S.C. § 1983 provides, in pertinent part:

> § 1983. Civil action for deprivation of rights
> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Id. See also Groman v. Township of Manalapan, 47 F.3d 628, 633, n.4 (3d Cir. 1995).

When interpreting this language, the Courts have opined that the statute does not create substantive rights; but, rather, it provides a remedy

for the violation of rights created by federal law. *Groman, supra* at 633 (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985)). Accordingly, in order to establish a prima facie case under 42 U.S.C. § 1983, a plaintiff must demonstrate: "(1) a person deprived him of a federal right; and (2) the person who deprived him of that right acted under color of state or territorial law." *Groman, supra* (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)).

Petitioner failed to satisfy these requirements. A private actor may cause a deprivation of a constitutional right; however, said actor is only subject to liability under Section 1983, when it does so under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). In the case *sub judice*, the alleged actions of Respondent were not performed under color of state law, and, thus, they cannot be considered state actors.

As Petitioner failed to establish a cause of action under 42 U.S.C. § 1983 or related statutes, a basis for federal question jurisdiction does not exist. Therefore, Petitioner's argument that he has provided a basis for federal question jurisdiction does not warrant Certiorari with this Court. Petitioner does not allege any reason why this Honorable Court would have jurisdiction to hear this claim. As stated in the Rules of the Supreme Court of the United States Rule 10, "a petition for a writ of certiorari will be granted only for compelling reasons." The Entry of Judgment of the United States Court of Appeals for the Third Circuit does not present an unsettled important question of law. Furthermore, the United States Court of Appeals for the Third Circuit has not decided an important federal question that conflicts with relevant

decisions of the United States Supreme Court. Therefore, there is no basis for jurisdiction in this Court.

B. THE COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CAUSE OF ACTION AS UNTIMELY.

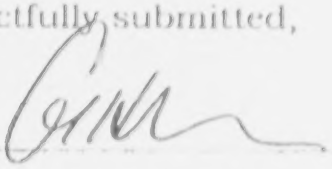
To assert his claims, Petitioner relied upon federal statutes that do not explicitly contain a provision regarding time limitations. Consequently, Pennsylvania's two year personal injury statute of limitations is applicable. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 (2005) (where a plaintiff relies upon federal statutes in asserting a claim, and those statutes do not contain a specific provision regarding the time within which an action may be brought, federal courts apply the statute of limitations governing suits for personal injury in which the action arises). Moreover, actions brought under 42 U.S.C. §§ 1983, 1985 and 1986 are subject to the statute of limitations prescribed for personal-injury actions in the state in which the relevant actions occurred. *See Lake v. Arnold*, 232 F.3d 360, 368 (3d Cir.2000).

This matter is well beyond the applicable statutory period, as this cause of action arises out of his mother's death on March 31, 2002 and the events preceding that date. Petitioner has not established any basis for jurisdiction with this Court, and, therefore, the request for certiorari must be dismissed.

VIII. CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

BY: 

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